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IN THE COURT OF APPEALS OF INDIANA

DWAYNE FRANKLIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0609-CR-000493
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Jones, Judge Pro-Tempore
Cause No. 49G05-0410-FC-184614

April 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Dwayne Franklin appeals from the revocation of his probation, claiming that the trial court improperly admitted certain documentary evidence at the hearing and that the State presented insufficient evidence to prove that Franklin recklessly, knowingly, or intentionally failed to pay restitution, costs, and fees. Finding no error, we affirm the judgment of the trial court.

FACTS

Pursuant to a plea agreement negotiated with the State, Franklin pleaded guilty to forgery, a class C felony, and resisting law enforcement, a class D felony, on December 21, 2004. The plea agreement called for the sentences to run concurrently with no more than four years executed, with the aggregate sentence not to exceed six (6) years. Thereafter, the trial court sentenced Franklin to an aggregate term of five years, with two years executed and three years suspended to probation. Among other things, Franklin was ordered to comply with the following conditions of probation: (1) maintain a verifiable residence and notify the probation department ten days prior to any change of address; (2) pay court costs and make restitution to Big Dog Liquors in the amount of $421.33; and (3) comply with a court-ordered substance abuse treatment program.

On June 9, 2005, Franklin was released to a community transitions program. Thereafter, on May 24, 2006, Franklin's probation officer filed a notice of probation violation. The notice of violation alleged that Franklin had failed to: (1) comply with court-ordered substance abuse treatment; (2) report his address to the probation department; and (3) make court-ordered restitution payments.

At the revocation hearing, probation officer William Lacey testified that Franklin was referred to the Indianapolis Counseling Center (Center) for outpatient treatment on October 11, 2005, as part of his substance abuse treatment requirements. According to Lacey, who testified without objection, the Center contacted the probation department on November 1, 2005, with an "alert" that Franklin "did not contact them when he was told to contact them on October 17, 2005, and he did not enroll in that program." Tr. p. 12; Ex. 4. The State offered Exhibit 3 into evidence—with no objection from Franklin—which consisted of the substance abuse alert form indicating that Franklin had failed to report. Lacey also testified that Franklin did not attend his intake until January 31, 2006, although the initial referral was made in October 2005. Lacey acknowledged that the probation department received another "alert" on February 27, 2006, informing his office that Franklin had been discharged from the program for missing a number of group meetings in February 2006. The State offered another "alert form" into evidence without objection, showing that Franklin had not attended the group meetings. Ex. 2. The State offered yet another exhibit that consisted of the Center's business records, which established that Franklin had only completed nine of thirty-six group sessions, that he had been discharged from the program, and that he admitted to using illegal substances while on probation. Franklin objected to this exhibit because he did not have an "opportunity to cross-examine the alleged writer," but the trial court overruled the objection "given the rules on admissibility and hearsay and probation violation hearings." Tr. p. 15-16. Thus, all of the State's proffered exhibits were admitted into evidence.

Lacey also testified that Franklin listed his address on a required "sign up sheet" as

xx08[1] Grand Avenue, Indianapolis, on May 18, 2006. Id. at 17. The trial court admitted the "sign up sheet" into evidence without any objection from Franklin. Id. at 17-18; Ex. 5. It was also established at the hearing that two probation officers went to the Grand Avenue address on May 19, 2006, but they learned from Franklin's sister that Franklin had not lived there for approximately two weeks. Franklin had not provided the probation department with any other address.

It was also shown that the trial court had ordered Franklin to pay restitution in the amount of $421.33 to Big Dog Liquors. Franklin also owed outstanding court costs, and a payment plan had been established for him to make monthly payments of $63.92. As of the date of the probation violation hearing on August 9, 2006, it was determined that Franklin had paid only $310 of the restitution owed to Big Dog Liquors.

At the conclusion of the hearing, the trial court determined that Franklin had violated all three conditions of probation as alleged by the State. As a result, Franklin was ordered to serve three years, with the first six months to be served in the Department of Correction and the remainder to be served in Community Corrections. Franklin now appeals.

DISCUSSION AND DECISION

I. Admission of Evidence

Franklin argues that the State's exhibits establishing the violations of probation were improperly admitted into evidence at the hearing. Specifically, Franklin contends that the documents containing "a negative description of Franklin's behavior during substance abuse

[1] We have intentionally deleted the first two numbers of the address for purposes of confidentiality.

counseling" were improperly admitted over his objection because "he had no meaningful opportunity to cross-examine the preparer of that document." Appellant's Br. p. 6.

In resolving this issue, we initially observe that the admission of evidence is within the sound discretion of the trial court, and the decision to admit evidence will not be reversed absent a showing of manifest abuse of the trial court's discretion resulting in the denial of a fair trial. Cox v. State, 774 N.E.2d 1025, 1026 (Ind. Ct. App. 2002). An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. Id. In determining whether evidence was properly admitted, we will only consider the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. Id.

We also note that a probation revocation hearing is not the equivalent of an adversarial criminal proceeding. Marsh v. State, 818 N.E.2d 143, 145 (Ind. Ct. App. 2004). Rather, a revocation hearing is a narrow inquiry, and its procedures are more flexible than those of a criminal proceeding. Id. As we recognized in Marsh:

> The [Indiana Supreme C]ourt held that in probation revocation hearings, "judges may consider any relevant evidence bearing some substantial indicia of reliability. This includes reliable hearsay." [Cox, 706 N.E.2d at 550] (footnote omitted). The absence of strict evidentiary rules in this context places particular importance on the fact-finding role of judges in assessing the weight, sufficiency, and reliability of proffered evidence. "This assessment . . . carries with it a special level of judicial responsibility and is subject to appellate review. Nevertheless, it is not subject to the Rules of Evidence (nor to the common law rules of evidence in effect prior to the Rules of Evidence)." Id.

Id. at 145-46.

In this case, while the State's Exhibits 1 and 2 relating to the missed meetings, Franklin's behavior, and the prognosis for future treatment were not certified, Franklin acknowledged that he had "no objection" to the admission of Exhibit 3—the alert form establishing that Franklin had not contacted the agency to schedule an intake appointment. No objection was made, inasmuch as it had been established that the document was ordinarily kept in the course of business and that Lacey was the keeper of the records. Tr. p. 13. Indeed, the trial court had already learned not only that Lacey was a probation officer with the court, but it was also established early in the testimony that Lacey was the keeper of the records. Thus, because it was shown that Lacey kept the records in the ordinary course of the probation department's business, Franklin has failed to show that the trial court abused its discretion in admitting the remainder of the State's exhibits into evidence.

Moreover, even assuming that the trial court erred in admitting the exhibits, the error was harmless because Exhibit 1 was merely cumulative of other testimony that was properly admitted. Lacey established through his testimony, and through Exhibit 3, that Franklin violated at least one term or condition of his probation, and that violation alone would have sufficed to support the trial court's revocation. See Washington v. State, 758 N.E.2d 1014, 1017 (Ind. Ct. App. 2001) (holding that a trial court may revoke probation upon the violation of any single term of probation). Therefore, the trial court's admission of the exhibits—at best—amounted to harmless error.

II. Sufficiency of the Evidence

Franklin argues that the evidence was insufficient to support the revocation of his probation. Specifically, Franklin maintains that the revocation must be set aside because the State failed to show that he recklessly, knowingly, or intentionally failed to pay his probation fees.

The grant of probation is a favor granted by the State, not a right to which a criminal defendant is entitled. Parker v. State, 676 N.E.2d 1083, 1085 (Ind. Ct. App. 1997). A probation revocation hearing is in the nature of a civil proceeding and, therefore, a violation need only be proven by a preponderance of the evidence. Washington, 758 N.E.2d at 1017. As noted above, a trial court may revoke a person's probation upon evidence of the violation of any single condition of probation. Id. Additionally, this court will neither reweigh the evidence nor judge the credibility of the witnesses. Rather, we look to the evidence most favorable to the State. If there is substantial evidence of probative value to support the trial court's decision that the probationer is guilty of a violation, revocation is appropriate. Id. The decision to revoke probation is a matter within the sound discretion of the trial court. Dawson v. State, 751 N.E.2d 812, 814 (Ind. Ct. App. 2001).

With regard to the payment of restitution, Indiana Code section 35-38-2-3(f) provides that probation may not be revoked for failure to comply with conditions of a sentence that imposes financial obligations on an individual "unless the person recklessly, knowingly, or intentionally fails to pay." To make such a determination, the trial court must inquire into the reasons for the failure to pay. Garrett v. State, 680 N.E.2d 1, 2 (Ind. Ct. App. 1997). If the trial court finds that a probationer has willfully refused to make restitution or has failed to

make sufficient bona fide efforts to pay, his probation can be revoked. Id.

In this case, it was determined at the time of the probation violation proceeding that Franklin had a total assessed debt of $2,237.33, but that he had paid only $310. Tr. p. 19-20. Franklin testified that he was no longer employed and could not longer make payments. Id. at 41. However, Franklin acknowledged that he never inquired into alternative methods for paying the fees and satisfying his debt. Id. From this evidence, it is apparent that the trial court concluded that it had a sufficient basis from which to find that Franklin knowingly, intentionally, or recklessly failed to pay the restitution and costs.

Although Franklin argues that the trial court's inquiry was not adequate to conclude that he willfully refused to make restitution, the State established that Franklin did not attend his substance abuse intake until January 31, 2006, even though he had been initially referred to the program in October 2005. Id. at 11-13. Moreover, the State proved that Franklin was discharged from the substance abuse program because he failed to attend five scheduled group meetings in February 2006 and had completed only nine of thirty-six sessions. Id. at 13; Ex. 1.

It was further established that on May 18, 2006, Franklin indicated that his address was xx08 Grand Avenue in Indianapolis. Id. at 17. When two probation officers went to this address, they learned from Franklin's sister that he had not lived there for two weeks. Id. at 18. Moreover, it was determined that Franklin failed to provide the probation department with any other address as required by the conditions of probation. Id. at 18-19.

From this evidence, it is apparent that the State proved that Franklin failed to comply

with at least two other conditions of his probation. Thus, because we have determined that Franklin's probation was properly revoked for the reasons stated above, we need not conclude that the trial court erred in revoking Franklin's probation because of his failure to pay restitution, court costs, and fees. See Washington, 758 N.E.2d at 1017.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.